



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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I—02—11

Mr. Jeffrey B. Fuge
Corporation Counsel
Polk County
1005 West Main Street, Suite 100
Balsam Lake, WI 54810

Dear Mr. Fuge:

¶ 1. You are concerned about the operation of Golden Age Manor, which is Polk County's nursing home.

BACKGROUND

¶ 2. You advise that the land upon which Golden Age Manor is located was deeded to the county on the condition that the property be used as a county infirmary. You state that the facility has never been established or operated as a county infirmary and has always been operated as a county home and more recently as a county nursing home. In *Eugene Sollman, et al. v. Polk County, et al.*, Court of Appeals, District III, Case No. 2008AP831-AC (September 16, 2008), the court of appeals enjoined the county's attempted transfer of Golden Age Manor to a private entity. In doing so, the court of appeals held in paragraph 17 of its decision that "because the land was donated for the special purpose of a County infirmary, the County was subject to the restrictions of WIS. STAT. §§ 59.52(6)(c) and 66.1025." The court of appeals did not decide, and did not have occasion to decide, whether the use of the property by the county as a county home or as a county nursing home complied with the restriction in the deed. The court of appeals held only that conveyance of Golden Age Manor to a private party would not comply with the donor's restriction.

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 3. You ask two questions:

1. May a county operate a licensed skilled care nursing facility on property which the county received [i]n a donation which was made on the condition that the land be devoted to the special purpose of a county infirmary without either [1] enacting a resolution to accept a grant from

the [d]onor or heirs of the donor that relieves the county of the condition or [2] seeking a court order that relieves the county of the condition?

¶ 4. In my opinion, the answer to the question as stated is yes. If an opinion is sought as to whether Polk County is in compliance with the terms of the deed restriction, that is a factual question. Our legal opinions cannot resolve factual questions. *See* 77 Op. Att’y Gen Preface, No. 3.C. (1988).

2. Does section 46.18(13) require a county to establish, maintain and annually appropriate moneys for the purpose of modernizing and replacing the buildings and equipment of a county nursing home which is operated on land received [i]n a donation which was made on the condition that the land be devoted to the special purpose of a county infirmary?

¶ 5. In my opinion, a county is required to maintain a reserve fund only for a facility established and operated as an infirmary under Wis. Stat. §§ 49.72, 49.723, and 49.726. Whether a reserve fund is required in order to comply with the condition in the deed is a factual question that is not an appropriate subject for an opinion of the Attorney General.

ANALYSIS

¶ 6. Your first question is whether a county board is required to commence legal action under Wis. Stat. § 66.1025(1) or (2) if the board has concluded that the county is not in compliance with the literal language contained in a deed restriction. Wisconsin Stat. § 66.1025 provides in part:

Relief from conditions of gifts and dedications. (1) If the governing body of a county . . . accepts a gift or dedication of land made on condition that the land be devoted to a special purpose, and the condition subsequently becomes impossible or impracticable, the governing body may by resolution or ordinance enacted by a two-thirds vote of its members-elect either to grant the land back to the donor or dedicator or the heirs of the donor or dedicator, or accept from the donor or dedicator or the heirs of the donor or dedicator, a grant relieving the county . . . of the condition, pursuant to article XI, section 3a, of the constitution.

(2)(a) If the donor or dedicator of land to a county . . . or the heirs of the donor or dedicator are unknown or cannot be found, the resolution or ordinance described under sub. (1) may provide for the commencement of an action under this section for the purpose of relieving the county . . . of the condition of the gift or dedication.

....

(c) The court may render judgment in an action under this subsection relieving the county . . . of the condition of the gift or dedication.

¶ 7. Your first question appears to assume that it is “impossible or impracticable” within the meaning of Wis. Stat. § 66.1025(1) for Polk County to operate Golden Age Manor as a county infirmary. That is a factual question which I do not address. It is unnecessary to do so in order to answer your question.

¶ 8. Wisconsin Stat. § 66.1025 provides the county board with two options. If the heirs are known and the condition upon which the grant was made subsequently becomes impossible or impracticable to meet, the county “may” by a two-thirds vote of the board grant the land back to the donor or the heirs of the donor or else accept a grant from the donor or the heirs of the donor relieving the county of the restriction. Wis. Stat. § 66.1025(1). If the donor and heirs are unknown or cannot be found, the county “may” by a two-thirds vote of the board commence a declaratory judgment action in circuit court to relieve the county of the restriction. Wis. Stat. § 66.1025(2).

¶ 9. Regardless of whether the county currently is unable to operate the facility as a county infirmary, the word “may” in a statute is permissive unless a contrary construction is required in order to carry out the clear intent of the Legislature. *See Rutherford v. LIRC*, 2008 WI App 66, ¶ 19, 309 Wis. 2d 498, 752 N.W.2d 897. It is quite conceivable that a county board would not be able to muster the two-thirds vote of its members-elect that is required under Wis. Stat. § 66.1025(1) and (2). The statutory context therefore reinforces that the word “may” in Wis. Stat. § 66.1025(1) and (2) imparts discretion and cannot be construed to mean “shall.”

¶ 10. If the county board does act under Wis. Stat. § 66.1025(1) or (2), it can obtain a judicial declaration in order to remove any legal uncertainty involving compliance with a deed restriction. If the county board does not act, a person who has standing to do so may bring a declaratory judgment or other legal action to determine whether the county is in compliance with deed restriction. If no one brings such an action, the county may continue to operate the property in a manner in which it is able to do so. The answer to your first question is that a county board is not required to commence legal action under Wis. Stat. § 66.1025(1) or (2), even if the board has concluded that the county is not in compliance with the literal language contained in a deed restriction.

¶ 11. Your second question is whether Wis. Stat. § 46.18(13) requires a county to establish, maintain, and annually appropriate moneys for the purpose of modernizing and replacing the

buildings and equipment of a county nursing home that is operated on land that was deeded on the condition that the property be used as a county infirmary. Wisconsin Stat. § 46.18(13) provides:

BUILDING RESERVE FUND. The county board shall maintain as a segregated cash reserve an annual charge of 2% of the original cost of new construction or purchase or of the appraised value of existing infirmary structures and equipment. If the infirmary or any of its equipment is replaced, any net cost of replacement in excess of the original cost is subject to an annual charge of 2%. No contributions to the cash reserve in excess of the amount required under this subsection may be included in the calculation under s. 49.726(1). The county board may from time to time appropriate from such reserve sums to be expended solely for the enlargement, modernization or replacement of such infirmary and its equipment.

¶ 12. By its terms, Wis. Stat. § 46.18(13) requires a county to establish a building reserve fund only for a property that is operated as a county infirmary. A county infirmary is established under Wis. Stat. § 49.72 and is operated as provided in Wis. Stat. §§ 49.72, 49.723, and 49.726.

¶ 13. A county home is established under Wis. Stat. § 49.70 and is operated under Wis. Stat. §§ 49.70 and 49.703. There is no statutory requirement that a county establish a building reserve fund for the operation of a county home.

¶ 14. A county may designate either a county infirmary or a county home to be licensed and operated as a nursing home under Wis. Stat. § 50.02. *See* Wis. Stat. § 46.175. Buildings licensed and operated as nursing homes are subject to minimum state standards. Wis. Stat. §§ 46.15, 46.16, and 46.17.

¶ 15. Because Golden Age Manor was never established or operated as a county infirmary, the answer to your second question is that there is no statutory requirement that a building reserve fund be established for that facility. If you are implicitly asking whether the existence of a building reserve fund is required by the terms of the deed, that is a factual question that cannot be resolved in this opinion.

CONCLUSION

¶ 16. I therefore conclude that a county board is not required to commence legal action under Wis. Stat. § 66.1025(1) or (2), even if the board has concluded that the county is not in compliance with the literal language contained in a deed restriction. I further conclude that

Mr. Jeffrey B. Fuge
Page 5

Wis. Stat. § 46.18(13) requires a building reserve fund only for a facility that is established and operated as a county infirmary under Wis. Stat. §§ 49.72, 49.723, and 49.726.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with the first name "J.B." and last name "Van Hollen" clearly distinguishable.

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla